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C O N F I D E N T I A L SECTION 01 OF 04 LUSAKA 000654

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SUBJECT: GOVERNMENT INTENT ON SINKING ITS FLAGSHIP
ANTICORRUPTION CASE

REF: A. LUSAKA 583

- [1B.](#) 07 LUSAKA 654
- [1C.](#) 07 LUSAKA 558
- [1D.](#) 07 LUSAKA 211
- [1E.](#) 05 LUSAKA 1612
- [1F.](#) 05 LUSAKA 709

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Classified By: Ambassador Donald Booth for Reasons 1.4(b) and (d)

[¶1.](#) (C) Summary. According to press comments by Zambian Vice President and Justice Minister George Kunda, the Zambian Government (GRZ) will not appeal the recent acquittal of former President Frederick Chiluba (Ref A), whom the GRZ had been prosecuting for the embezzlement of USD 500,000. He made the announcement during President Banda's travel abroad and Kunda may have been acting without Cabinet approval. Several civil society organizations have spoken out against not appealing the case, including the Law Association of Zambia, which issued a recommendation that there are ample grounds for appeal. Transparency International Zambia claims that State House manipulated the judiciary in order to obtain Chiluba's acquittal. By dismissing the head of the Task Force on Corruption (TFC) and denying it adequate operational funding, the GRZ has rendered useless its most effective and independent anti-corruption institution, an institution that has received significant donor assistance. The GRZ's failure (after more than two years and recent explicit U.S., Dutch, British, and World Bank private appeals) to register the judgment of the UK case in which Chiluba and others were found liable of upwards of USD 58 million reinforces the notion that President Banda is set on vindicating Chiluba. These and other developments suggest that the Banda Administration is not seriously committed to fighting corruption. During the previous Administration, former President Levy Mwanawasa responded to strong and direct donor pressure. Although it is not too late for Banda to redeem himself, there is little to suggest that he will. End Summary.

GRZ WILL NOT APPEAL

[¶2.](#) (C) According to press statements by Vice President Kunda, the GRZ's Director of Public Prosecutions (DPP) Chalwe Mchenga has decided not to appeal the case against former President Chiluba. In a public address in Northern Province on September 22, Kunda announced that Mchenga had agreed with Magistrate Jones Chinyama's assessment that the Task Force on Corruption had failed to make a convincing case. Kunda also put forward that it would be "unprofessional," even an act of "professional misconduct" for the DPP to appeal "knowing well that the case is frivolous and of no merit whatsoever." Kunda's choice of words came as little surprise to many civil

society representatives who have described Kunda (who concurrently serves as the Minister of Justice) as the GRZ's primary obstacle to progress on the anti-corruption front.

¶13. (SBU) Information Minister Ronnie Shikapwasha and Works and Supply Minister Mike Mulongoti also publicly expressed their support for dismissing the case. In a statement that even his worst critics subsequently praised for its candor, Mulongoti argued that Chiluba's imprisonment would have been costly to the State and that "some people should go to jail, while others should remain free." He went on to say that judges are "human beings" that must "keep political order." Shikapwasha, nicknamed the "ten million man" for the bribes that he allegedly received when serving as Home Affairs Minister and High Commissioner in Tanzania, suggested that Cabinet's recently approved national anti-corruption policy (rather than its inaction on the Chiluba case) is evidence enough of the GRZ's "very strong" commitment to fighting corruption.

¶14. (C) There is a grain of truth to Kunda's and Mchenga's assessment of the strength of the case. DLA Piper, the law firm that represented the GRZ in the civil suit against Chiluba (Refs B and C), told poloff that its legal team had to redo much of the legwork that TFC investigators had commenced, including re-taking testimony from key witnesses. Additionally, because of the ring fence order on the civil case, DLA Piper could not readily share information with TFC prosecutors. Its limitations notwithstanding, however, the TFC had a strong case, which was made all the more promising when Chiluba refused to testify under oath, rendering his defense worthless. Indeed, the evidence against Chiluba was so overwhelming in London that Justice Peter Smith ruled that Chiluba should be liable for not just USD 500,000 but upwards of USD 58 million (USD 41 million plus interests and

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¶15. (C) Magistrate Chinyama's criminal case judgment appears to rely on several assumptions that may lack legal basis, namely that Chiluba's reimbursement of the monies stolen is a defense to the charge of theft and that despite serving as the nation's president, Chiluba was not a "public servant" as defined by the penal code. Additionally, Chinyama relied on Chiluba's unsworn testimony because there was no evidence contradicting it and chose to believe that the funds that Chiluba had accessed from the GRZ account had been his personal funds. Task Force lead prosecutor Mutembo Nchito points out that according to Zambian law, even if Chiluba had deposited personal funds into a government account (something that Chiluba failed to show), immediately upon doing so, they would have become government monies. Nchito also argued that Chiluba's unsworn testimony could not legally be taken as evidence as he could not be cross-examined.

¶16. (C) Kunda's contention that there are weak grounds for appeal rings hollow in light of the strong grounds for prosecution and the UK civil judgment. His comments (particularly with regard to the case's frivolity) are all the more remarkable when considering that as Attorney General, he led the civil case against Chiluba and attended much of the UK proceedings. Opposition leader Michael Sata rhetorically asked why Kunda maintains the case has no merit, yet spent several months in London on taxpayers' money: "Why did he go to London then? Was it to just eat our money?" Kunda's seeming indifference to the UK suit manifests itself in the GRZ's complicity in allowing Chiluba's lawyers to delay registration of the UK judgment, which would allow the GRZ to seize Chiluba's assets in Zambia. The Ministry of Justice and the Office of the Attorney General failed to acknowledge a U.S. Department of Treasury technical advisor's offers of assistance in 2007 to help recover Chiluba's assets. Donors, particularly the United States, United Kingdom, Netherlands, and World Bank on numerous occasions also have entreated Banda to register the judgment.

¶7. (C) On September 25, Livestock and Fisheries Minister Bradford Machila told Ambassador and Polchief that Kunda has acted without Cabinet discussion or approval in announcing that the GRZ will not appeal the Chiluba ruling. Agriculture Minister Brian Chituwo relayed the same message separately to the European Union Head of Mission. Machila, who served as Deputy Justice Minister during much of the UK civil suit, suggested that it is not too late for Cabinet to direct Mchenga to appeal and characterized the whole situation as a "disaster." Machila offered little, however, to suggest that such a Cabinet discussion or State House directive was on the horizon.

GRZ UNDERMINES AND UNDERCUTS

¶8. (C) By some accounts, State House has manipulated the judiciary to vindicate Chiluba. Politicos (including ruling, opposition, and independent party members) have accused the DPP and Cabinet of colluding to undercut the case. Opposition leader Hakainde Hichilema, who previously likened Chiluba's plundering to "a monkey in a maize field," accused Banda of desperately doing "anything and everything to stay in power, even if it means breaking the law." Former Special Assistant to Mwanawasa Jack Kalala told journalists that this creates the impression that "if you are a politician you are above the law." An editorial in the daily independent newspaper, The Post, decried that Kunda "has demonstrated that he does not belong in a democratic dispensation; he wants to live in an autocratic state where only minions like himself and his paymaster Rupiah have a say on issues and. . . wants us all to become his praise singers and sycophants."

¶9. (C) According to Transparency International Zambia (TIZ), a State House representative paid a visit to Magistrate Jones Chinyama on August 14, immediately prior to his ruling on the Chiluba case. Following the discussion, Chinyama postponed the ruling to August 17 and added an additional 20 pages to the judgment. TIZ told poloff that (due to something that transpired during the meeting with the State House official) Chinyama reversed what would have been a guilty verdict (septel). Rumors that the GRZ wanted to acquit Chiluba in order to capitalize on his popularity in Luapula and Northern Provinces and among evangelical Christians were borne out when he showed up on the campaign trail for the ruling Movement for Multiparty Democracy (MMD) candidate in an October 15 by-election in Northern Province.

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¶10. (SBU) In a separate development, the GRZ straightaway dismissed TFC Chairman Maxwell Nkole after the Chiluba acquittal -- not because the TFC lost the Chiluba case but because the TFC appealed it (without State House or DPP consent). Shikapwasha acknowledged that Nkole's contract had come to an end but admitted that "there was clearly an element of indiscipline, which were (sic) the reasons for the non-renewal of his contract." State House has not appointed a new chair to resume Nkole's duties and GRZ budget support to the TFC remains scanty.

¶11. (SBU) Despite GRZ claims that the Chiluba case lacks merit, the conservative Law Association of Zambia publicly offered its legal opinion that, based on its reading of Chinyama's judgment, there are ample grounds for appeal. Nevertheless, Chiluba made his enthusiasm for the DPP's decision well known when he pledged to support Banda from hereon, "day and night." The Post addressed the irony of Chiluba supporting the DPP in a recent editorial, noting that is not often that the accused rushes to the defense of the prosecution, "like a thief defending a policeman." The GRZ's dismissal of Nkole, and its holding back of budgetary funds, bodes poorly for the TFC's capacity to continue functioning effectively, including its wherewithal to prosecute existing

cases as well as to handle cases (that it has won) that are on appeal before the High Court, such as the conviction of Chiluba's wife, Regina.

¶12. (C) Comment: Opposition leaders' caustic statements point to a reversal in positions from 2006, when Mwanawasa had to defend his government's anti-corruption campaign against criticism from Sata, who claimed the TFC was costly and ineffective. Three years later, the tables appear to have turned given Banda's apparent determination to pull the plug on the TFC while the opposition pounds away at the ruling party for its inadequate respect for the rule of law and questionable commitment to fighting corruption. An important contributor to this development is Chiluba's falling out with Sata (for whom he campaigned in the 2006 presidential election) and his subsequent falling-in with Banda. Time will tell whether Banda's association with Chiluba is a political asset or a liability, but in the interim, the opposition's usurping of the anti-corruption platform could be costly to the leading party in the 2011 elections, particularly as anti-corruption was a pivotal component of Mwanawasa's campaign strategy in 2001 and the continuation of it was a key feature of Banda's 2008 campaign. End Comment.

BILATERAL IMPACT

¶13. (C) If it chooses not to pursue the case further, the GRZ will shut down what had been become its most visible and perhaps most important TFC case and the flagship of the GRZ's (or at least Mwanawasa's) anti-corruption campaign. It also undermines the GRZ's investment in -- as well as donor support to -- the TFC since its inception in 2002. Although the GRZ was the largest single backer to the TFC, the combined financial support from the governments of Norway, Sweden, Denmark, Netherlands, and United Kingdom constituted the majority of the TFC budget. Technical assistance through resident and intermittent U.S. Department of Treasury advisors also amounted to several million USD.

¶14. (C) The present situation bears an uncanny resemblance to events in 2005, when Kunda (then-Minister of Justice and Attorney General) and Mchenga entered a nolle prosequi on the TFC case against former Ministry of Health Permanent Secretary Kashiwa Bulaya (Ref D) on the basis that the case lacked merit and was not in the public interest. In a one-on-one meeting with Mwanawasa, then-Ambassador Brennan pointed out that the GRZ's decision to dismiss the ironclad case would have serious ramifications on the bilateral relationship. Ambassador also delivered similar messages directly to the President with other donors. In response, Mwanawasa withdrew the nolle prosequi, if somewhat reluctantly, and less than two years later Bulaya, was convicted (however he is free on bail pending his appeal). Despite taking the high ground, Mwanawasa not long thereafter dismissed the strong and artful TFC Chair, Mark Chona, presumably for acting against State House interests (Refs E and F).

¶15. (C) In the Bulaya case, the donors help set the GRZ back on track. Now, with arguably more at stake, there is an enormous incentive to engage in another successful donor intervention. Fortunately, with the recent Ministry of

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Health scandals, there is broad support among the donors to hold the GRZ accountable and for the past six months donors have been pressing the GRZ for needed governance reforms. Although the GRZ has made some positive announcements, such as the establishment of an independent, administrative Financial Intelligence Unit at the Bank of Zambia and the approval of a national anti-corruption policy, the government has failed to match its rhetoric with concrete action. In the absence of anything substantive, Banda's Administration

will appear ineffective at best and utterly corrupt at worst, thereby worsening public perceptions of corruption and possibly placing in jeopardy massive amounts of development assistance, including a possible Millennium Challenge Account (MCA) Compact now under negotiation.

¶16. (C) The credibility of the GRZ's anti-corruption campaign during the Mwanawasa Administration made possible a positive new chapter in U.S.-Zambian relations (Ref E). Bilateral relations in 2001 were cordial on the surface but Chiluba's government was so mired in corruption, the USG had long decided the platform for enhanced development assistance did not exist. When Mwanawasa announced in July 2002 that his New Deal government had zero tolerance for corruption, the USG took note. Mwanawasa soon won over many skeptics by establishing the TFC, which had GRZ support, independence, and strong leadership (Ref F). Consequently, USG development assistance to Zambia rose from USD 40 million in 2001 to over USD 300 million in 2009 (not including debt relief or the USG 25% contribution to the international financial institution projects in Zambia).

¶17. (C) Comment: If the GRZ sinks its flagship anti-corruption case, abandons its TFC, and fails to match its anti-corruption rhetoric with deeds, it may lose its MCA eligibility as well as eligibility for other assistance programs. Once again, the credibility of the GRZ's anti-corruption campaign may make possible a new chapter in U.S.-Zambian relations. It is not too late for Banda to redeem himself, but there is regrettably little, thus far, to suggest that he will.

BOOTH